Constitutionally Permissible Funding Restrictions for Sex Trafficking and HIV/AIDS Prevention

OLC has considered the constitutional implications of the following funding restrictions in the Trafficking Victims Protection Reauthorization Act (TVPRA), the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act (USLAHATMA), and the Consolidated Appropriations Act:

> (1) restrictions on the use of program funds, which require (with a minor difference between TVPRA and USLAHATMA) that program funds not be used to promote, support, or advocate the legalization or practice of prostitution, *see* 22 U.S.C. § 7110(g)(l) (as added by TVPRA § 7(7)); USLAHATMA § 301(e);
>
> (2) organization-wide restrictions, which would require an organization receiving funds either to refrain from promoting prostitution or its legalization, *see* 22 U.S.C. § 7110(g)(2) (as added by TVPRA § 7(7)), or to have a policy explicitly opposing prostitution and sex trafficking, *see* USLAHATMA § 301(t); and
>
> (3) a restriction on what may be said when an organization wants to provide information about the use of condoms as part of a project or activity funded by the Consolidated Appropriations Act, *see* Pub. L. No. 108-199, Div. D, Title II (2004).

In the limited time available to us, we have not been able to conduct a comprehensive analysis, but we have reached the following tentative views, which might need to be altered after further analysis:

- [REDACTED]*
- With regard to category (2), the organization-wide restrictions, which would prevent or require certain advocacy or positions in activities completely separate from the federally funded programs—
  - cannot be constitutionally applied to U.S. organizations, whether they are recipients or subrecipients, and whether they are operating inside or outside the United States;
  - can be constitutionally applied to foreign organizations whether they are recipients or subrecipients, but only when they are engaged in activities overseas. The government could exercise its foreign-affairs and plenary immigration powers to exclude from the United States a foreign organization that advocates certain views. The government could also argue, albeit with considerable litigation risk, that it could deport a foreign organization that advocates certain views. But powers to exclude or deport are separate from grant funding, and an organization's advocacy in the United States cannot justify termination of or failure to renew a grant.
- [REDACTED]

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* A simple definition of a foreign organization is contained in the Mexico City Policy: an organization "that is not organized under the laws of any State of the United States, the District of Columbia, or the Commonwealth of Puerto Rico." *Restoration of the Mexico City Policy*, 66 Fed. Reg. 17303, 17303 (2001). The Mexico City Policy has withstood First Amendment challenges (though not every question has been fully litigated). Our constitutional advice here essentially mirrors the limits of the Mexico City Policy with regard to [REDACTED] category (2).